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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition On Defining Certain Incumbent LEC	)	
Affiliates As Successors, Assigns, or Comparable	)	CC Docket No. 98-39
Carriers Under Section 251(h) of the	)	
Communications Act	)	

COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

In its "Petition for Declaratory Ruling, etc.," filed March 23, 1998, the Competitive Telecommunications Association ("CompTel"), on behalf of itself and other named parties, sought a declaratory ruling, or in the alternative a rulemaking, concerning interpretation of Section 251(h) of the Communications Act ("CompTel Petition"). CompTel requests the Federal Communications Commission ("FCC") use Section 251(h)(1) or (2) of the Communications Act ("Act") to impose on any competitive local exchange carrier ("CLEC") affiliated with an incumbent local exchange carrier ("ILEC") the obligations of ILECs under Section 251(c).

Whatever the merits of this request in the case of large ILECs, it should not be granted with respect to midsize ILECs defined as "2%" companies under the provisions of Section 251(f)(2) of the Act, because:

(1) Midsize incumbent carriers lack the motive for conduct, the prevention of which justifies, in CompTel's view, the requested Section 251(h) interpretations (p.3);

(2) Midsize companies don't have "regions." Subjecting them to policies premised

on "in-region" versus "out-of-region" will impair, not promote, competition (p.5);

(3) Applying the requested interpretations to midsize companies will interfere with midsize company and State commission exercise of existing statutory rights and processes under Section 251(f)(2) of the Communications Act (p.6); and

(4) In the case of midsize carriers, Commission effort is more effectively spent on enforcement of existing rules, rather than prescription of new ones (p.8).

In support of these matters, the Independent Telephone & Telecommunications Alliance ("ITTA"), which represents incumbent carriers who qualify under the 2% provisions of Section 251(f)(2) and who are otherwise affected directly by CompTel's requested interpretations,[1] sets forth the following matters for Commission consideration.

1. Introduction.

CompTel's analysis commences with the observation that incumbent local exchange carriers have duties of interconnection under Section 251(c). It asserts next that an ILEC will seek to avoid such duties and that, in order to achieve such avoidance, the ILEC will create an affiliated competitive local exchange carrier in the ILEC's serving territory. Thereafter, the ILEC will transfer customers or contracts (or perhaps facilities, operations, systems, etc.), to its affiliated CLEC. CompTel then asserts that, in the absence of the requested interpretations, such a CLEC will not be subject to the obligations of an incumbent carrier under Section 251(c) (and particularly Section 251(c)(4) resale). Thus, asserts CompTel, the ILEC will effectively evade the burdens of Section 251(c) through the vehicle of its CLEC affiliate.

CompTel concludes that to forestall this eventuality, the FCC must impose Section 251(c) burdens on CLEC affiliates of ILECs covered by that section. This imposition requires

[1] A list of the companies represented by ITTA is attached hereto as Exhibit A.

either that such CLECs be defined as "successors or assigns" of their affiliated ILECs, under Section 251(h)(1); or be defined as carriers "comparable" to their affiliated ILECs, under Section 251(h)(2) of the Act. In either case, the full range of obligations under Section 251(c) would be imposed thereby upon such affiliated CLECs.

CompTels' concerns are not frivolous. Neither ITTA nor its member companies condone any unlawful evasion of legal duties arising under Section 251(c) of the Act, but CompTel's Petition sweeps broadly and so catches up those ILECs for whom the proposed remedy is neither necessary nor reasonable. For the reasons set out herein, any grant of CompTel's request for Section 251(h) interpretation should expressly exclude application thereof to midsize companies.

2. Given the Availability of Section 251(f)(2) Processes, Midsize Companies Lack the Motives Described by CompTel to Engage in Illegal Evasions.

The implicit key to CompTel's arguments is the unavoidability of Section 251(c) obligations. The requested relief presumes that all ILECs, lacking other means, are motivated to use affiliated CLECs to circumvent Section 251(c) obligations. For larger ILECs, this premise may be plausible (whether or not factually accurate), but midsize companies do not lack other means, since they may seek at any time to lawfully suspend or modify Section 251(b) and (c) interconnection obligations under 251(f)(2). For such ILECs, interconnection obligations may be modified, and CompTel's underlying premise is invalid.

Section 251(f)(2) of the Act grants 2% companies the right to petition for the suspension or modification of any Section 251(b) or (c) requirement. That right must be granted whenever any one of several standards is met, including (under Subsection (A)) adverse economic impact on users, undue economic burden, or technical infeasibility. These tests are in the disjunctive: meeting one is sufficient to satisfy the statute. The right is continuously available. The statute places no limitations on when, or how many times, a qualifying carrier may exercise this right.

The right can be tailored in its exercise in several ways. It can be shaped to the "telephone exchange facilities specified in such petition" (i.e., 2% companies are not faced with an all-or-nothing scope but can tailor their requests to individual jurisdictions, operations, systems, wire centers, etc). In a different vein, the exercise of the right is addressed to an individual State commission (and not the FCC) . Thus, 2% companies are not faced with an all-or-nothing scope as to all affiliated operations. This combination of availability and flexibility manifestly makes the Section 251(f)(2) process an efficacious as well as lawful way for addressing Section 251(c) obligations, for those ILECs comprehended by the 2% definition.

The efficacy of Section 251(f)(2) processes undercuts CompTel's rationale for imposing Section 251(h) interpretations on midsize ILEC affiliates. It leaves the FCC in the position of having to conclude (in order to grant the relief requested), that 2% companies will prefer unlawful to lawful means for modifying interconnection obligations.

Such a conclusion lacks any credible foundation. CompTel's cited example of alleged abuse involves a large ILEC, for whom Section 251(f)(2) processes are unavailable. Even if the conduct as depicted is unlawful (a matter unclear from the limited evidence presented), the example supports ITTA's point here no less than CompTel's. Conversely, with respect to Section 251(c)(4) resale concerns raised by CompTel, its speculations have been proved wrong in at least one midsize company case of record. Century Telephone Enterprises, in successfully sustaining an exemption under parallel Section 251(f)(1) of the Act, expressly and voluntarily offered wholesale-discounted resale, under Section 251(c)(4), to the competitive carrier requesting interconnection.[2] CompTel's Petition presumes and relies upon the opposite of such

[2] See *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Termination of the Rural Exemption of and Arbitration with TELEPHONE UTILITIES OF THE NORTHLAND, INC., under 47 U.S.C. Sections 251 and 252 for the* (cont'd) *Purpose of Instituting Local Exchange Competition*, Alaska Public Utilities Docket U-97-144, Order No. 2, January 8, 1998, at 41:

conduct.

The substantial degree of flexibility available in the Section 251(f)(2) process; the broad evidential standards applicable to such petitions; and the actual conduct by midsize companies concerning interconnection all combine to undercut the unsupported speculation of CompTel's Petition in the circumstance of midsize companies. No basis is offered for the presumption that such companies will choose the risk and expense of unlawful means for avoiding interconnection obligations, when lawful means – with less risk and expense – are perpetually available.

3. Midsize Companies Do Not Have "Regions." Subjecting Them to Policies Premised upon "In-Region" Versus "Out-of-Region" Will Impair, Not Promote, Competition.

CompTel's Petition acknowledges the desirability in principle of CLEC affiliate competition:

(We note that CompTel, FCCA, and SECCA have no objections to an ILECs establishing a CLEC affiliate outside the ILEC's service territory.... Such an entry by an ILEC affiliate into another ILEC's territory is exactly the kind of competition that the Telecommunications Act of 1996 was intended to stimulate.) [3]

The Petition nonetheless asks for a declaratory ruling that "so-called CLEC affiliates of ILECs providing in-region local service . . . be treated as dominant ILECs under Section 251(h)...." "In-region" is both a defined term and an integral concept concerning the Bell Operating Companies ("BOCs"). It derives from the AT&T Consent Decree. It is addressed in the statutory provisions of the Act[4] specifying the manner in which reciprocal BOC entry into long distance and competitive carrier entry into BOC serving regions shall occur. None of this, past or present, has anything to do with midsize carriers.

> The Commission [APUC] has further determined that TUNI has voluntarily waived its rural exemption with respect to the provision of competitive services in the form of resale of TUNI's services at wholesale rates.

[3] CompTel Petition at 3.
[4] See 47 U.S.C. Section 271(i)(1).

Midsize companies do not have "regions." They are not large enough. Rather, such companies often represent isolated pockets, substantially or wholly surrounded by a regional BOC. Being surrounded, as Custer might have observed at Little Bighorn, entails positional disadvantages. The Senate saw it this way and proposed the predecessor to Section 251(f)(2):

> The Senate intends that the Commission . . . use this authority to provide a level playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the [2%] company or carrier.[5]

The continuing consolidation of the BOCs results in such nationwide entities with financial and technological resources significantly greater than those of the individual midsize companies.

Against this backdrop, application of the Petition's proposed restrictions to midsize companies heads in the wrong direction. To promote competition, Congress increased competitive flexibility for midsize companies. The Petition would diminish such flexibility, and thereby hinder the ability of midsize companies to compete. The Commission, instead, would better serve the public interest by fashioning ways in which the isolated midsize companies can pursue a transition to competition in multiple serving areas, thereby to become more effective competitors against those with significantly greater resources.

4. Grant of CompTel's Petition, as to Midsize Companies, Would Unlawfully Contravene and Interfere with Section 251(f)(2) of the Act.

CompTel's Petition suggests a simple solution to an apparently simple problem. In the case of midsize companies, however, this simplicity masks deeper jurisdictional crosscurrents implicated by the overlapping effects of Sections 251(h) and 251(f)(2).

Under Section 251(f)(2), petitioning carriers must address their petitions to the appropriate State commission, rather than the FCC. It is the State commission which

[5] Joint Explanatory Statement of the Committee of Conference, Conference Report, Telecommunications Act of 1996, at 119 (January 31, 1996).

"determines" whether any suspension or modification meets the statutory criteria, discussed above. Further, midsize ILECs retain a continuing right under Section 251(f)(2) to demonstrate at any time the inapplicability of Section 251(c). Conversely, under CompTel's approach, the imposition of Section 251(c) obligations on an affiliated CLEC – whether under Section 251(h)(1)(B)(ii) or 251(h)(2) – rests, *a priori*, upon the existence of a Section 251(c) obligation in the affiliated ILEC. Such an interpretation of Section 251(h), imposed as a matter of law, would effectively preclude, or at least materially skew, the process for suspension or modification congress afforded to midsize companies.

In this circumstance, Commission interpretation of Section 251(h) is not simply a fire-and-forget activity. FCC adoption of CompTel's Petition would lead to a federal rule imposing Section 251(c) burdens on affiliated CLECs. The Section 251(f)(2) process (as well as interconnection enforcement under Section 252) could lead to state commission rulings modifying or eliminating those same burdens on the affiliated midsize ILEC. Jurisdictional conflicts are likely to become unavoidable. In each Section 251(f)(2) case, the interpretation, application, and consequences of the Commission's Section 251(h) interpretations (including those associated with the proposed "rebuttable presumption" standard) will have to be decided, either by the States or by the Commission. As the current Petition exemplifies, the FCC is quite likely to be called upon to fashion further rules each time a state commission decides, over time and in individual 2% cases, its rules. Considering that there are more than 1,000 companies below the 2% threshold, subject to 50 state jurisdictions (yet affecting only about 4% of the nation's access lines), one might ask how much prospective "sub-rulemaking" the Commission desires to entertain.

These concerns are not ephemeral. The State commissions have substantial responsibility

for how competition develops in their states. As the Petition's Attachment demonstrates, CLECs are certified by the states. In the process of certifying CLECs and overseeing local competition, some states have already addressed CompTel's concerns regarding transfers of customers between incumbents and their affiliated competitive carriers.[6] These adopted policies reflect differing conclusions about how such a transfer should be accomplished, in furtherance of state competitive goals. In adopting CompTel's proposed interpretations, the FCC risks collision with existing and emerging state policies, in an area arguably reserved to the states (or at least not clearly committed to the FCC). ITTA suggests that the case for undertaking that risk, as to midsize ILECs, is lacking.

5. In the Case of Midsize Companies, Commission Policies Concerning Affiliated CLECs and ILECs Should Focus upon Enforcement, Not Prescription.

To the extent CompTel's Petition is motivated by demonstrable abuses, such abuses should be addressed and, as warranted, punished. As ITTA noted in its Forbearance Petition, "the Commission already has mechanisms in place to detect and eliminate anticompetitive practices."[7] Section 251(c)(4)(B), in particular, empowers the Commission to establish regulations regarding resale. The Commission has done so.[8] These rules are not subject to suspension under the Circuit Court's ruling in *Iowa Utilities Board*.[9] Effective enforcement mechanisms do, indeed, exist.

Rather than rigorous enforcement, however, CompTel's approach seeks to perpetuate and to further particularize prescriptive regulation. In the cause of preventing imaginable but undemonstrated abuses, CompTel proposes new rules on top of existing rules. CompTel asserts

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[6] See, e.g., *In Re Investigation of The Southern New England Telephone Company*, Docket No. 94-10-05 (Conn.D.P.U.C. June 25, 1997) and subsequent decisions therein.

[7] Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, filed February 17, 1998, noticed for public comment April 2, 1998, DA 98-480; at ii.

[8] See 47 C.F.R. Part 51, Sections 51.1 – 51.809 ("Interconnection").

such rules are "a logical next step" from existing Commission decisions, and finds this a positive. It is not. Logical next steps constitute an endless process since, no matter how thoughtfully drafted, no regulation can foresee every future variable, particularly in a market transitioning from monopoly and regulation to competition and deregulation. CompTel's Petition unintentionally proves this point.

This paradigm of successive waves of increasingly particularized regulations flows contrary to the Congressional design for "a pro-competitive, de-regulatory national policy framework...." A different direction, very much needed to promote the transition to deregulation and competition, was described recently by Commissioner Michael Powell:

> Another way that we can make regulation more efficient is to shift our resources from prospective regulation to enforcement. . . . Rather than imagining all the dangers that might result if we let a company do what it has asked and then take equally speculative action to meet those speculative dangers, let's instead police conduct and make decisions based on real facts. If there are "teeth" in our enforcement efforts, companies will take heed or pay the price.[10]

As noted above, the FCC has an effective ability to exact a price for interconnection abuses. This ability, allied with the lack of motive for abuse and the other matters discussed above, renders Commissioner Powells' approach of enforcement rather than prescription a particularly appropriate response to CompTel's Petition in the case of midsize companies.

6. Conclusion

ITTA noted in its Forbearance Petition the call of Chairman William Kennard for "common sense" in the development and application of regulatory policy. These comments are an appeal to that common sense. ITTA does not belittle CompTel's concerns or the importance of interconnection to the competitive scheme established by Congress, but the premises underlying CompTels' requested action simply do not apply to midsize companies. Midsize

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[9] *Iowa Utilities Board, et al. v. FCC*, 109 F.3d 418 (8th Cir. 1996).

companies have no demonstrated history of abusing interconnection obligations. They have effective, efficient, lawful statutory vehicles for modifying such obligations. The means for effecting those rights rest with the State commission, and not with the FCC. The CompTel Petition does not contradict these assertions or the conclusions to be drawn therefrom. CompTel's proposed solutions, in the context of midsize companies, thus run counter to congressional concerns for deregulation, without adequate justification.

Because not all ILECs have a statutory means for addressing the modification of interconnection burdens, the need in other cases may in fact be different, but the existence of that means for midsize companies clearly mitigates the suppositions upon which CompTel's requested rulings rest. In this light, the proposed "remedy" must necessarily prove worse than the nonexistent illness and ought not to be applied to midsize companies.

Respectfully submitted,

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[10] "Technology and Regulatory Thinking – Albert Einstein's Warning," Remarks of Michael K. Powell, Commissioner, Federal Communications Commission, before the Legg Mason Investor Workshop, Washington, D.C., March 13, 1998 (as prepared for delivery), pp. 5, 6.

Exhibit A

ITTA Member Companies

Aliant Communications	Lincoln, NE
ALLTEL	Little Rock, AR
ATU Telecommunications	Anchorage, AK
Century Telephone Enterprises, Inc.	Monroe, LA
Cincinnati Bell Telephone	Cincinnati, OH
Citizens Communications	Stanford, CT
The Concord Telephone Company	Concord, NC
Illinois Consolidated Telephone Co.	Mattoon, IL
Lufkin-Conroe Telephone Exchange, Inc.	Lufkin, TX
North State Telephone Company	High Point, NC
Rock Hill Telephone Company	Rock Hill, SC
Roseville Telephone Company	Roseville, CA
TDS Telecom	Madison, WI